

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 RAFAEL REID,)
11 Petitioner,)
12 v.) 3:17-cv-00532-HDM-VPC
13 CCS BAKER, et al.) **ORDER**
14 Respondents.)
15)

16 This counseled habeas matter comes before the court on the
17 petitioner's motion to stay and abey (ECF No. 20) and motion for leave
18 to file under seal (ECF No. 18).

Petitioner initiated this action with the dispatch of his 28 U.S.C. § 2254 petition in August 2017. (See ECF No. 1-1). Following initial review, the court appointed petitioner counsel. (ECF No. 5). Through counsel, petitioner has filed an amended petition for writ of habeas corpus. (ECF No. 16). Because petitioner has not exhausted the claims in his petition, petitioner now asks the court to stay this action and hold his claims in abeyance while he returns to state court to exhaust his claims. Respondents do not oppose petitioner's request. (ECF No. 21).

28 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed
limitations upon the discretion of the court to facilitate habeas

1 petitioners' return to state court to exhaust claims. The *Rhines*
2 Court stated:

3 [S]tay and abeyance should be available only in limited
4 circumstances. Because granting a stay effectively
5 excuses a petitioner's failure to present his claims first
6 to the state courts, stay and abeyance is only appropriate
7 when the district court determines there was good cause
8 for the petitioner's failure to exhaust his claims first
9 in state court. Moreover, even if a petitioner had good
10 cause for that failure, the district court would abuse its
11 discretion if it were to grant him a stay when his
12 unexhausted claims are plainly meritless. Cf. 28 U.S.C.
13 § 2254(b) (2) ("An application for a writ of habeas corpus
14 may be denied on the merits, notwithstanding the failure
15 of the applicant to exhaust the remedies available in the
16 courts of the State").

17 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t
18 likely would be an abuse of discretion for a district court to deny
19 a stay and to dismiss a mixed petition if the petitioner had good
20 cause for his failure to exhaust, his unexhausted claims are
21 potentially meritorious, and there is no indication that the
22 petitioner engaged in intentionally dilatory litigation tactics." *Id.*
23 at 278.

24 The Ninth Circuit has held that the application of an
25 "extraordinary circumstances" standard does not comport with the "good
26 cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425 F.3d 654,
27 661-62 (9th Cir. 2005). This court has declined to prescribe the
28 strictest possible standard for issuance of a stay. "[I]t would
appear that good cause under *Rhines*, at least in this Circuit, should
not be so strict a standard as to require a showing of some extreme
and unusual event beyond the control of the defendant." *Riner v.*
Crawford, 415 F. Supp.2d 1207, 1210 (D. Nev. 2006). Thus, a
petitioner's confusion over whether or not his petition would be
timely filed constitutes good cause for the petitioner to file his

1 unexhausted petition in federal court. See *Riner v. Crawford*, 412 F.
2 Supp. 2d at 1210 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17
3 (2005)).

4 The court has the discretion to stay a completely unexhausted
5 petition. *Mena v. Long*, 813 F.3d 907, 911 (9th Cir. 2016).

6 Petitioner asserts that his appellate counsel never advised him
7 that a decision had been entered in his direct appeal, despite
8 petitioner attempting to contact counsel and advising the state court
9 of counsel's non-responsiveness. Petitioner did not learn his appeal
10 had been decided until a year later, after another inmate suggested
11 he consult the appellate docket in his case. By the time petitioner
12 learned his appeal had been decided, the state statute of limitations
13 for habeas petitions had expired. Petitioner almost immediately filed
14 the instant federal habeas petition.

15 The court finds that counsel's failure to advise petitioner of
16 the decision in his appeal constitutes good cause for the petitioner's
17 failure to first exhaust his claims in state court before filing in
18 federal court. The court further finds that at least one of
19 petitioner's claims is not "plainly meritless," and that petitioner
20 has not engaged in intentionally dilatory litigation tactics.
21 Accordingly, petitioner's unopposed request for a stay and abeyance
22 (ECF No. 20) will be granted.

23 Turning to petitioner's motion for leave to file under seal,
24 petitioner seeks to file under seal four exhibits: a police interview
25 of the victim (Ex. 7); the victim's medical records (Ex. 8); the
26 State's psychosexual evaluation of petitioner (Ex. 9); and the defense
27 psychosexual evaluation of petitioner (Ex. 10). The Court finds, in
28 accordance with the requirements of *Kamakana v. City and County of*

1 *Honolulu*, 447 F.3d 1172 (9th Cir. 2006), that a compelling need to
2 protect the privacy and/or personal identifying information of
3 petitioner and the victim with regard to the sealed exhibits outweighs
4 the public interest in open access to court records. In particular,
5 the victim's interview with police contains repeated, explicit
6 references to the nature of the assault as well as personal
7 identifying information. Accordingly, the motion to seal (ECF No. 18)
8 will be granted.

9 IT IS THEREFORE ORDERED that petitioner's motion to seal (ECF No.
10 18) is GRANTED.

11 IT IS FURTHER ORDERED that petitioner's motion for a *Rhines* stay
12 and abeyance (ECF No. 20) is GRANTED.

IT IS FURTHER ORDERED that this action is stayed pending exhaustion of the claims in petitioner's petition.

15 IT IS FURTHER ORDERED that the grant of a stay is conditioned
16 upon petitioner litigating his state post-conviction petition or other
17 appropriate proceeding in state court and returning to federal court
18 with a motion to reopen within forty-five (45) days of issuance of the
19 remittitur by the Supreme Court of Nevada at the conclusion of the
20 state court proceedings.

IT IS FURTHER ORDERED that the Clerk shall administratively close this action, until such time as the Court grants a motion to reopen the matter.

24 || TT TS SQ ORDERED.

25 DATED: This 13th day of August, 2018.

Howard D McElhaney

HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE